IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
CRAWFORD E. DAVIS, II,	§	CASE NO. 99-60378-7
	§	
Debtor	§	
RICHARD SALMON,	§	
	§	
Plaintiff	§	
	§	
vs.	§	ADVERSARY NO. 99-6028
	§	
CRAWFORD E. DAVIS, II,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Plaintiff, Richard Salmon (Salmon), supplied "floor plan" financing to the Debtor, Crawford E. Davis, II (Davis), for Davis's used car business. No written document was introduced into evidence outlining the terms of the floor plan financing.

2. Salmon financed Davis's purchase of used cars to be resold by Davis in his used car business. Specifically, Salmon would fund the purchase of cars but retained possession of the titles to the cars until "redeemed" upon resale of the cars by Davis. Salmon began financing Davis in the spring of 1995.

3. This arrangement worked reasonably well until the last quarter of 1997. Apparently, at this time, it was discovered that approximately forty cars were sold by Davis without redeeming the titles from Salmon by payment in accordance with their arrangement. In addition, Salmon received approximately $30,000.00 in hot checks from Davis.

4. In December, 1997, Salmon and Davis negotiated a new arrangement to address the unredeemed titles and hot checks, though it appears it took several months to sort out the details of their new arrangement. By document entitled "Addendum to Floor Plan Agreement", dated December 19, 1997, and signed by Davis and Salmon, Davis acknowledged that approximately forty cars had been sold without Salmon being paid in accordance with their floor plan agreement. Salmon's Exh. No. 7. This instrument further provides that Salmon released the titles on the forty cars to an entity named "Southwest Motors" and he would, in return, be paid by Southwest Motors from notes receivable being collected or sold by Southwest Motors. *Id.*

5. The status of Southwest Motors as of December, 1997, i.e. whether it was a corporation, partnership, or simply a business name used by Davis, is unclear from the evidence.

6. By the terms of an "Assignment of Notes Receivable" also dated December 19, 1997, and signed by Davis and Salmon, the notes receivable held by Southwest Motors and established as a result of the cars "floor-planned by Richard Salmon and not paid off in a timely manner when sold . . ." were to be collected by Southwest Motors and paid to Salmon on a bi-monthly basis. Salmon's Exh. No. 6.

7. Despite the existence of both the Addendum to Floor Plan Agreement and the Assignment of Notes Receivable, both dated December 19, 1997, the actual promissory note from Davis to Salmon, representing the indebtedness arising from the sold cars and hot checks, was not signed until April 1, 1998. Salmon's Exh. No. 10. The note reflects a principal balance of $214,907.27 with a $30,000.00 payment due April 10, 1998, followed by thirty-six monthly installments of $5,000.00 each month, beginning May 10, 1998, and a final payment of $4,907.27 due at maturity. *Id.*

8. Several payments were made on the promissory note. At time of trial, the approximate balance was $138,000.00.

9. Salmon testified that he understood an individual named Clifford Bly was affiliated with Southwest Motors, that he agreed to release the titles because Bly required they be released before Southwest Motors would "do the deal".

10. While the evidence does not identify the status of Southwest Motors in December, 1997, it apparent that the entity SWM Automotive, Inc. d/b/a Southwest Motors existed as of April, 1998. At that time, an elaborate arrangement was established by Davis, SWM Automotive, Inc., and Economy Finance Co., Inc. Economy Finance Co., Inc. is a corporation apparently owned and controlled by Clifford Bly. Economy Finance Co., Inc. made loans to SWM Automotive, Inc., backed in part by Davis's personal guarantee and pledge of stock in SWM Automotive, Inc. Davis's Exhs. H, I, J, K, L, M, and O. The loan proceeds were used for making payments to Salmon, which payments were carried by SWM Automotive, Inc. as loans to Davis personally. Davis acquired his interest in SWM Automotive, Inc. by contributing the notes receivable that he accrued in his used car business. Davis's Exh. P.

11. Salmon did not depose Davis during the bankruptcy, nor did Salmon attend the 341 creditors meeting.

12. This adversary proceeding was jointly tried with the adversary proceeding of *Rick Schkade v. Crawford E. Davis, II*, Adversary No. 99-6027. The findings of fact and conclusions of law in Adversary No. 99-6027 are attached hereto as Exhibit "A" and are incorporated herein as additional findings of fact and conclusions of law.

13. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

14. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

15. While Salmon has pled an objection to Davis receiving a discharge under § 727(a)(5) of the Bankruptcy Code (11 U.S.C.), this cause of action was not urged at trial. Section 727(a)(5) provides that the court shall grant the debtor a discharge, unless the debtor has failed to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. The objecting party has the burden to prove an objection under § 727(a)(5). Rule 4005, Fed.R.Bankr.P. Salmon did not prove a loss of assets or a deficiency of assets and therefore failed to prove a prima facie case under § 727(a)(5). Salmon's claim under § 727(a)(5) is denied.

16. The pre-trial order filed with the court recites that Salmon objects to dischargeability of his debt under § 523(a)(2) of the Bankruptcy Code. At trial, Salmon limited his claim to § 523(a)(2)(A). This provision states that a discharge under § 727 does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2)(A).

17. A creditor must prove its claim of nondischargeability by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 211 F.3d 214, 216-17 (5th Cir. 2000); *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995).

18. For a debtor's representation to be a false representation or pretense, a creditor must show that the debtor: (1) made a knowing and fraudulent falsehood; (2) describing past or current

facts; (3) that was relied upon by the creditor; (4) who thereby suffered a loss. *In re Mercer*, at 216-17; *RecoverEdge* at 1292-93.

19. The loans made by Salmon to Davis were made for the purpose of allowing Davis to purchase used cars for resale in Davis's businesses. Salmon held the titles to be released upon payment from Davis. However, there is no evidence to establish the terms of repayment or the mechanics of how the arrangement actually worked.

20. When it was discovered that approximately forty cars were sold without Davis redeeming the titles, Davis and Salmon entered into a new arrangement under which Salmon released the titles in return for a note payable to Salmon.

21. Salmon's release of the titles upon entering into the new arrangement evidences the uncertainty of Davis's representation or promise to Salmon regarding Davis's redemption of the titles through payment to Salmon upon sale of the floor-planned cars.

22. If it is assumed that Davis represented to Salmon that Salmon would be paid from available funds immediately upon resale of the used cars floor-planned by Salmon, there is no evidence that such representation was false when made. At most, it is a representation by Davis that he intended to pay Salmon upon resale of the cars.

23. Given the indefinite nature of any representation made by Davis, Salmon has failed to prove that he relied on any representation made by Davis.

24. To prove nondischargeability under an actual fraud theory under § 523(a)(2)(A), the objecting creditor must prove that: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditors; (4) the creditor relied on such representations; and (5) the creditor sustained losses as a proximate result of the representations. *RecoverEdge* at 1292.

25. To the extent Salmon seeks a determination of nondischargeability for actual fraud under § 523(a)(2)(A), such claim must also fail for the same reasons set forth above regarding Salmon's claim of nondischargeability because of false pretenses/false representation.

26. Salmon's claim under § 523(a)(2)(A) is denied.

27. If appropriate, these conclusions of law shall be findings of fact.

Signed October ____, 2000.

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Robert L. Jones
UNITED STATES BANKRUPTCY JUDGE